U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF K-B-, INC.

DATE: OCT. 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software design and development company, seeks to permanently employ the Beneficiary in the United States as a software engineer under the second preference immigrant classification of advanced degree professional. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent residence.

The Director, Texas Service Center, denied the petition. The Director found that the Petitioner did not establish its ability to pay the proffered wage of the job offered, as well as the proffered wages of the jobs offered in other pending and approved employment-based immigrant visa petitions, from the priority date of the instant petition onward.

The matter is now before us on appeal. The Petitioner has submitted a letter from counsel and additional documentation, and asserts that it has established its ability to pay the proffered wage offered to the instant Beneficiary. Upon *de novo* review, we will dismiss the appeal.

## I. PROCEDURAL HISTORY

The instant petition, Form I-140, Immigrant Petition for Alien Worker, was filed on June 4, 2014. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which was filed with the Department of Labor (DOL) on June 28, 2013, and certified by the DOL on February 24, 2014. In section G of the labor certification the Petitioner stated that the proffered wage for the job offered is $89,000 per year.

As evidence of the Petitioner's ability to pay the proffered wage, the Petitioner submitted copies of the following documentation with its Form I-140 and in response to the Director's request for evidence (RFE):

- The Petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2013;
- The Petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2014;

- The Petitioner's unaudited balance sheet as of December 31, 2004, compiled[1] by Certified Public Accountant (CPA) and
- A list of five other beneficiaries of Form I-140 petitions that were filed by the Petitioner in 2014 and mentioned in a letter from counsel that accompanied the filing of the instant petition.

On December 17, 2015, the Director issued a decision denying the petition. While finding that the evidence of record established that the Beneficiary met the educational and experience requirements of the job offered, the Director denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage of the job offered, as well as the proffered wages of five other Form I-140 beneficiaries. The Director noted that the Petitioner had never employed the Beneficiary, and thus could not establish its ability to pay the proffered wage based on actual payments to the Beneficiary. The Director reviewed the Petitioner's federal income tax return for 2013, which recorded net income of $18,316 and net current assets of $58,372, and found that neither figure was sufficient to pay the proffered wage of $89,000 that year.

The Director also reviewed the Petitioner's unaudited balance sheet for 2014, which recorded net income of $476,436 and net current assets of $812,583. While both of these figures exceeded the proffered wage, the Director indicated that no finding of the Petitioner's ability to pay the proffered wage in 2014 could be based thereon for a number of reasons. First, the Petitioner had not submitted evidence requested in the RFE about the proffered wages and wages paid to other Form I-140 beneficiaries, without which it could not be determined whether the Petitioner's total wage obligations to the instant Beneficiary and other Form I-140 beneficiaries exceeded its net current assets. Secondly, the net income and net current assets figures in the 2014 unaudited balance sheet are so much larger than the net income and net current assets recorded in the 2013 tax return that the Director questioned their reliability, especially since the CPA did not state that the financial statements accorded with generally accepted accounting principles in the United States and the Petitioner did not specify whether the same accounting methods were used in the 2014 unaudited financial statement as in the 2013 Form 1120S. The Director indicated that in any future proceedings based on the instant job offer, the Petitioner must submit one of the three types of financial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), which includes audited, but not unaudited, financial statements. For the reasons discussed above, the Director found that the Petitioner did not establish its continuing ability to pay the proffered wage since the priority date of June 28, 2013.

The Petitioner filed its appeal on January 15, 2016, which was supplemented by a letter from counsel and additional documentation consisting of a letter dated January 12, 2016, from the CPA,

[1] The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a Petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Financial statements produced pursuant to a compilation rather than an audit are insufficient to demonstrate the ability to pay the proffered wage.

an "Independent Auditor's Report" dated March 31, 2015, by together with the Petitioner's audited financial statements for 2014; the first two pages of the Petitioner's 2014 Form 1120S; and other previously submitted federal tax documents. The Petitioner asserts that the evidence of record establishes its ability to pay the proffered wage of the job offered in the years 2013 and 2014.

## II. LAW AND ANALYSIS

The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by the Service.

Thus, the Petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the priority date is June 28, 2013.

The Petitioner must establish that its job offer to the Beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the certified ETA Form 9089, the Petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the Beneficiary obtains lawful permanent residence. The Petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the Petitioner to demonstrate financial resources sufficient to pay the Beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will also be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the Petitioner's ability to pay the proffered wage, USCIS first examines whether the Beneficiary was employed and paid by the Petitioner during the period following the priority date. If the Petitioner establishes by documentary evidence that it employed the Beneficiary at a salary equal to or greater than the proffered wage, the evidence is considered *prima facie* proof of the Petitioner's ability to pay the proffered wage. In this case, the Petitioner has not employed the

Beneficiary. Thus, the Petitioner cannot establish its ability to pay the proffered wage from the priority date onward based on the wages actually paid to the Beneficiary.

If the Petitioner does not establish that it has paid the Beneficiary an amount at least equal to the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures entered on the Petitioner's federal income tax return(s). If either of these figures equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the Beneficiary in a given year, the Petitioner would be considered able to pay the proffered wage during that year.

On the Petitioner's Form 1120S for 2013, net income (or loss) is recorded in Schedule K, line 18 ("Income/loss reconciliation"),[2] while net current assets (or liabilities) are the difference between the Petitioner's current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L. As shown in the tax return, the Petitioner's net income was $18,316 and its net current assets were $58,372 in 2013. Since both of these figures were well under the proffered wage of $89,000, the Petitioner cannot establish its ability to pay the proffered wage in 2013 based on its net income or net current assets that year.

In his letter submitted with the appeal dated January 12, 2016, the Petitioner's CPA, [redacted] asserts that the 2013 tax return does not accurately reflect the Petitioner's financial situation because it used the cash method of accounting which does not include amounts owed by customers. Under the cash method of accounting, revenue is recognized when it is received, and expenses are recognized when they are paid. *See* http://www.irs.gov/publications/p538/ar02.html#d0e1136 (accessed Oct. 13, 2016). This office would, in the alternative, have accepted tax returns prepared pursuant to the accrual method of accounting, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS).

We are not persuaded by an analysis in which the Petitioner seeks to rely on tax returns prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the Petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting method then the Petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relied on its tax returns in order to show its ability to pay the proffered wage in 2013, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The net income and net current assets

[2] If an S corporation's income is exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21 of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 (income/loss reconciliation) of Schedule K. In this case, there are relevant entries in Schedule K, so the income/loss figure on line 18 of Schedule K is applicable.

amounts shown on the Petitioner's 2013 tax return do not establish the Petitioner's ability to pay the proffered wage in 2013.

states in his letter on appeal that the "2013 tax return should not be used in any manner of determining the financial position of the [Petitioner]. They are merely prepared in accordance with the tax laws, which do not accurately reflect the financial position of the [Petitioner]." However, federal tax returns are specifically identified in the regulation at 8 C.F.R. § 204.5(g)(2) as one of the three alternative types of evidence, along with annual reports and audited financial statements, required to establish a Petitioner's ability to pay the proffered wage. There is ample judicial precedent for determining a petitioner's ability to pay the proffered wage based on its federal income tax returns. *See, e.g., Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)). The Petitioner did not submit audited financial statements or an annual report for 2013. The Petitioner has not established its ability to pay the proffered wage in 2013.

The Petitioner has submitted copies of a 2014 Form 8879S, IRS *e-file* Signature Authorization for Form 1120S, along with the first two pages of its 2014 federal income tax return, Form 1120S. The forms are undated, and the Petitioner has not explained why the rest of the Form 1120S tax return has not been submitted. According to the Form 8879S (Part 1, line 5), the Petitioner had net income in 2014 of $37,472, as recorded on Form 1120S, Schedule K, line 18 (though Schedule K has not been submitted). Since Schedule L has not been submitted either, there is no evidence of the Petitioner's net current assets (or liabilities) in 2014. Thus, the incomplete tax return for 2014 does not establish the Beneficiary's ability to pay the proffered wage based on either its net income or its net current assets that year.

letter submitted on appeal refers to "Independent Auditor's Report" dated March 31, 2015, and the Petitioner's audited financial statements as of December 31, 2014. The audited financial statements were prepared pursuant to the accrual method of accounting. According to the audit, the Petitioner had net income of $483,101 in 2014 and net current assets at year's end of $819,558. While these figures are sufficient to establish the Petitioner's ability to pay the proffered wage of the instant Beneficiary, no information has been furnished about the Petitioner's wage obligation with respect to its other Form I-140 beneficiaries. The Director requested this information in his RFE and his decision, and the Petitioner has still not submitted the requested information on appeal. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

In addition to the instant Beneficiary, the Petitioner must establish its ability to pay the proffered wages of all its other beneficiaries of Form I-140 immigrant petitions from the priority date of the instant petition until each beneficiary obtains lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See* 8 C.F.R. § 204.5(g)(2); *see also Matter of Great Wall*, 16 I&N Dec. at 144; *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our dismissal

of an appeal where a petitioner did not demonstrate its ability to pay multiple beneficiaries). As previously discussed, the Director's RFE requested information about the proffered wages and wages paid to its other Form I-140 beneficiaries, based on information provided by the Petitioner's counsel when the instant petition was filed that five other Form I-140 petitions were also being filed. The RFE requested a list of all Form I-140 petitions filed by the Petitioner in 2013, 2014, and 2015, the priority date and proffered wage of each beneficiary, evidence of wages paid to any or all of the beneficiaries, the status of each petition, and whether any of the beneficiaries has obtained lawful permanent residence. The Petitioner responded to the RFE with the names of five beneficiaries of Form I-140 petitions filed in 2014, along with their receipt numbers, the status of the petitions, and the employment status of the beneficiaries. As noted by the Director in his decision, however, no information was provided about the proffered wages and actual wages paid to these beneficiaries. Thus, no determination could be made regarding the Petitioner's total wage obligations and its ability to pay them. On appeal the Petitioner has not submitted any further information or documentation about these Form I-140 petitions.

Aside from the five petitions discussed above, USCIS records show that the Petitioner filed additional Form I-140 immigrant petitions in the years 2014 and 2015, including two that were filed before the Petitioner's response to the RFE on March 12, 2015 on June 11, 2014, and on March 11, 2015). Five more Form I-140 petitions were filed between April and November 2015, and 3 more in March 2016. USCIS records also show that seven Form I-140 petitions were filed in 2012, three in 2011, and five in 2010. The Petitioner has provided no information about the current status of any of these petitions, the employment and immigration status of the beneficiaries, their proffered wages, or the wages paid to them since the priority date of the instant petition in 2013.

The Petitioner was put on notice by the Director's RFE, issued on January 14, 2015, that it must provide information about all of its Form I-140 beneficiaries so that USCIS could determine the Petitioner's total wage obligations and wages paid since the priority date in 2013. Without this information we cannot determine the Petitioner's ability to pay the proffered wage of the job offered in this proceeding, and the proffered wages to its other Form I-140 beneficiaries, from the priority date onward. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. at 614-15. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the Petitioner states that it has been in business since 2005, had 46 employees at the time the petition was filed in June 2014, and had 52 employees at the end of 2014. On its federal income tax return for 2013, the Petitioner recorded gross receipts of $9,083,288, with expenditures of $3,218,194 for salaries and wages. The audit in March 2015 stated that the Petitioner's revenue in 2014 was $15,546,089, and that a total of $4,543,885 was expended on salaries and wages. Thus, the Petitioner's business appears to have grown from 2013 to 2014, but that time period is too short to conclude that the Petitioner has demonstrated a historic pattern of growth since its incorporation in 2005. The record contains no evidence of the Petitioner's reputation within its industry, or the occurrence of any uncharacteristic business expenditures or losses in any relevant year. Furthermore, as discussed above the Petitioner had numerous other Form I-140 petitions pending or approved in the years 2013-2016 for which no information has been provided about the wage obligations related to those petitions and the extent to which those wage obligations have been met. Based on the evidence of record, therefore, we determine that the Petitioner has not established that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the proffered wage of the job offered, in addition to the proffered wages due on all of its other Form I-140 petitions, from the priority date onward.

For all of the reasons discussed above, we conclude that the Petitioner has not established its continuing ability to pay the proffered wage of the job offered, and the proffered wages owed on its other Form I-140 immigrant petitions, from the priority date of the instant petition up to the present. Accordingly, the petition cannot be approved, and the appeal will be dismissed.

## III. CONCLUSION

When USCIS examines a petitioner's ability to pay the proffered wage, the fundamental focus of our determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. at 145. Based on the evidence of record in this case, we determine that the Petitioner has not established its continuing ability to pay the proffered wage of the job offered from the priority date of June 28, 2013, up to the present, as well as the proffered wages owed on all of its other Form I-140 immigrant petitions from that date up to the present.

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

**ORDER**: The appeal is dismissed.

Cite as *Matter of K-B-, Inc.*, ID# 89627 (AAO Oct. 18, 2016)